Convention on Choice of Court Agreements

Task of implementation now rests with State and Justice, along with uniform state law commissioners.

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Because this convention will benefit American and non-U.S. litigants, these legislative activities deserve attention from practitioners and scholars. Designing this new legislation will require extensive consultation as well as sensitivity to the global, federal and state implications of international treaties in areas that have historically been regulated in part by state law.

Other nations that are considering ratification of the convention will watch the U.S. implementation carefully. For example, on April 1, the minister of justice of the Czech Republic, acting for the presidency of the European Union, signed the convention for the European Community, which has exclusive competence in this field and will propose details for ratification and implementation in member states. Argentina, Australia and Canada, among others, are also reported to be studying whether to ratify.

The Hague Convention would afford to choice-of-court agreements and resulting judgments many of the same advantages of enforcement that arbitral agreements and awards enjoy under the successful 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which more than 140 states have ratified. The United States implemented the 1958 convention in 1970 by supplementing the provisions of Chapter 1 of Title 9 of the U.S. Code with a new Chapter 2 addressing scope, jurisdiction, venue and removal and enforcement of foreign arbitral agreements and awards. Courts of the United States have extensively interpreted these provisions, and the American Law Institute is currently restating the law of international commercial arbitration. See www.ali.org (Projects).

The new Hague treaty generally applies to exclusive choice-of-court agreements in international contracts between businesses (e.g., excluding consumer and employment contracts). The convention requires a court in a treaty party that is chosen by the parties to take jurisdiction over their dispute. The convention also requires courts of a treaty party that is not designated by the parties to decline jurisdiction if either party files suit other than where agreed. Finally, the treaty requires U.S. courts to enforce a judgment resulting from a court designated by the parties. Narrow exceptions apply to all of these basic rules. For detailed discussion of the provisions of the convention, see Ronald Brand and Paul Herrup, The 2005 Hague Convention on Choice of Court Agreements (C.U.P. 2008) and the Hague Conference on Private International Law’s bibliography.

In the absence of the new Hague Convention, enforcement in courts of the United States of both choice-of-court agreements designating foreign-country courts and of the resulting judgments are governed largely by state law. Since the late 19th century, U.S. courts have favored such enforcement under standards, first articulated as federal common law in Hilton v. Guyot, 159 U.S. 113 (1895), that state courts have followed and elaborated.

Further, 30 states plus the District of Columbia and the U.S. Virgin Islands have adopted the 1962 Uniform Foreign Money Judgments Recognition Act; 14 of those 30 states have enacted or are considering enacting the 2005 Uniform Foreign-Country Money Judgments Recognition Act to update the earlier uniform statute. (The other two have adopted or propose to enact only the 2005 uniform statute.) Both uniform laws prescribe rules for en-
enforcement of foreign-country judgments and resulted from drafting and approval by NCCUSL (for text, list of states enacting and background, see www.nccusl.org).

The State Department is currently preparing for the consultation and assembling the documentation that will be required to seek Senate advice and consent for the Hague Convention. It is also drafting the necessary federal legislation to implement aspects of the convention. At the same time, NCCUSL has established a drafting committee that is preparing a proposed uniform state law for implementation of the Hague Convention. That committee has met on several occasions and its draft Choice of Court Agreement Act received a first reading at NCCUSL’s annual meeting in Santa Fe, N.M., earlier this month. Under its Advisory Committee on Private International Law, the State Department has scheduled for July 27 the first meeting of a study group on implementing the convention domestically. 74 Fed. Reg. 30660 (June 26, 2009).

In the coming months, the State Department and NCCUSL will need to coordinate their respective efforts for implementation of the Hague Convention. Members of the NCCUSL committees have expressed concern with the potential “disharmony” in state law that could result from U.S. adherence to new private international law conventions if they are implemented solely through federal legislation. As a result, the State Department has been coordinating with NCCUSL among others on how to implement various private international law conventions, including consideration of possible declarations and understandings.

For example, the department, with NCCUSL’s concurrence, concluded that the U.N. Convention on the Assignment of Receivables in International Trade could be implemented without federal or state legislation. On the other hand, for the U.N. Convention on Independent Guarantees and Standby Letters of Credit, a different approach is being considered. It appears that convention could be largely implemented as state law through amended provisions of Article 5 of NCCUSL’s Uniform Commercial Code, while certain provisions might be treated as self-executing or, alternatively, implemented through new federal law.

STATE OR FEDERAL LEGISLATION

The co-reporter of the NCCUSL Drafting Committee for the Hague Convention, Professor H. Kathleen Patchel of Indiana University School of Law — Indianapolis, has recommended implementing the new treaty by state legislation because its provisions implicate substantive state contract law. She would proceed by analogy to the “cooperative federalism” used in domestic law to “avoid disruption of the current federal-state balance.” Such cooperation would be achieved by “conditional federalism,” under which, she explains, “the federal incentive [to the states] is the threat of preemption through enactment of federal legislation if the states do not enact state law consistent with federal guidelines.” States would have the option of opting out of the federal legislation if they wished to enact distinct but uniform state law. Absent such state action, she proposes, the enacted federal legislation would become state law.

Others have urged that the new Hague Convention be implemented only through federal legislation and question whether distinct state legislation is desirable. For example, Professor Stephen B. Burbank of the University of Pennsylvania Law School has explained that uniform federal legislation for this purpose would not displace but rather would borrow state law as the source of rules for the implementing legislation on certain matters (e.g., on questions of public policy when the relevant legal interest, right or policy is governed by state law or on questions of capacity under a uniform federal choice of law rule). Stephen B. Burbank, “Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States,” 2 J. Priv. Int’l L. 287 (2006).

For a variety of policy and practical reasons, he and others argue, the convention requires a uniform federal rule on a number of key issues (e.g., permissible grounds for nonenforcement of an agreement or judgment, the meaning of key terms such as “exclusive,” the scope of certain possible declarations and the permitted declaration for nonexclusive contracts). Further, with a single federal statute, non-U.S. litigants and courts would be spared having to consider the legislation of every U.S. state when addressing issues under the convention resulting from designation of a U.S. court.

In the end, participants in the dialogue regarding how to implement the Hague Convention in the United States need to avoid becoming too dogmatic over their recommended approaches. State, Justice, NCCUSL and other interested parties need a reasoned and cooperative exchange of good and practical ideas for implementation — not political controversy over states’ rights or other issues. The convention was designed to serve middle-class litigants who want to avoid excessive cost and delay and who seek efficient judicial resolution of disputes. Non-U.S. parties and courts will view the treaty as promoting legal certainty if the United States’ approach to implementation avoids for them, to the extent possible, the potential complexities of federalism.

Finally, the United States initiated the lengthy process in the Hague Conference that led to the convention. U.S. interests in gaining future multilateral cooperation in the conference and elsewhere on projects in this field will be well served by prompt implementation that convinces other nations not only to take similar action on the convention but also to continue working with the United States on other mutually beneficial private international law instruments.

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